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Christine Faller
Georgetown University Law Center

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ECONOMIC HARDSHIP AND HISTORIC PRESERVATION OF NON-PROFITS:
Balancing Individual Burden with Community Benefit

Christine Faller

Historic Preservation
Professor Boasberg
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INTRODUCTION

One of the unfortunate byproducts of historic preservation laws is that upkeep and adaptation of historic properties can be expensive. For example, the Boys and Girls Club of Greater Washington had to spend \$100,000 on wooden windows to conform to the implementing regulations of the District's Historic Preservation Act. That was a five-fold increase over the price the Club had paid three years prior to install the same windows in vinyl.¹ In another case, a church in New York City was forced to take on a financial burden of \$4.5 million, or one third of the church's total endowment, to adapt its landmarked property.²

Taking these financial burdens into account can be difficult for non-profit landowners,³ whose motive is community service rather than commercial gain. In some jurisdictions, courts and city councils have taken steps to modifying analysis of "takings" claims or economic hardship claims under the historic preservation law, for these owners.⁴ These changes provoke two questions. Are these analyses analogous to takings claims made by commercial owners? What facts could a non-profit owner produce that would support a takings claim?

There are argument supporting creation of an alternate standard for takings claims brought by non-profit owners. Ultimately, however, legislative bodies possess the discretion to set standards in historic preservation laws, within the outer bounds of the constitutional standard

¹ Decision and Order of the Mayor's Agent, HPA #02-421 (8 Aug. 2003).

² *St. Bartholomew's church v. City of New York*, 914 F.2d 348 (1990).

³ Most of the landowners discussed in this paper are churches or charities, all share tax-exempt status and a common motive of community service. Unless further distinction is necessary, all will be referred to simply as "non-profit owners" in this paper.

⁴ All landowners have the option of contesting burdensome regulations under the "takings" clause of the Fifth Amendment of the Constitution. The amendment provides a list of protections from government action, and end by stating "nor shall private property be taken for public use, without just compensation." Regulations that "go too far" may "take" property under this amendment, just as if the government had taken physical possession of the land, according to *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). Economic hardship claims are claims made under local historic preservation laws. The standard that must be met for each claim is essentially the same. Where the distinction is unnecessary, this paper will refer simply to takings claims.

for a taking. No standard has yet emerged that clearly moves away from the constitutional level. This paper will examine how a number of jurisdictions treat the takings standard for non-profit organizations, and will suggest ways of clarifying and improving the law. Part I discusses *Penn Central*,⁵ which sets the high national standard to for takings claims. This section also discusses how local governments have incorporated that standard into historic preservation laws as economic hardship claims. Part II analyzes how some jurisdictions make a distinction between commercial and non-profit owners in takings claims, and what claimants must demonstrate to succeed in making a claim. Part III concludes by examining the competing rationales supporting and opposing the creation of a modified standard. It also proposes recommendations for future development in this field.

I. THE *PENN CENTRAL* STANDARD IN TAKINGS CLAIMS

A. The Constitutional Takings Standard

The legal standard for when a government regulation, including a historic preservation law, “goes too far”⁶ and works a taking of a property was set in the Supreme Court’s 1978 decision in *Penn Central Transportation Co. v. City of New York*.⁷ The case arose from the application of New York City’s Landmark Preservation Law to the Grand Central Station. The station was designated a landmark in 1967.⁸ The next year, Penn Central Transportation Co. (Penn Central), the owners of the station, submitted two proposals for additions to the building to

⁵ 438 U.S. 104 (1978).

⁶ 260 U.S. at 415.

⁷ 438 U.S. 104. *Penn Central* is a historic preservation case as well as a takings case. The case is discussed here for its significance as the Supreme Court’s interpretation of that clause of the Fifth Amendment. The case also provides an example of the application of the Landmarks Law to commercial properties. Because the focus of this paper is on application to non-profit properties, however, the paper discusses only cases applying the non-profit owner provision of the Landmarks Law in Part II

⁸ *Id.* at 115.

the Landmark Preservation Commission.⁹ Both were designed by famed architect Marcel Breuer, and featured a modern, 55-story skyscraper, one standing over and one replacing the façade of the original beaux-arts building.¹⁰ Both were rejected.¹¹ Penn Central then asserted a claim in state court that application of the Landmark Preservation Law amounted to a taking of their property without just compensation in violation of the Fifth Amendment, as applied via the Fourteenth Amendment.¹² Following appeals through the New York Courts, the Supreme Court held that the historic preservation law did not effect a taking of the plaintiff's property because the owners could still derive a reasonable economic return on their investment in the land.¹³ The Court applied an "ad hoc, factual inquir[y]" to determine when a taking has occurred.¹⁴ Three factors guide this inquiry, the "economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct, investment-backed expectations," and the "character of the governmental action."¹⁵ The factors apply to the entire property under the regulation.¹⁶ Owners must show more than that they are burdened to a greater extent than landowners whose properties are not historic.¹⁷ Analyzing Penn Central's claims under this framework, the Court found that the company's investment-backed expectations were not dashed by the Commission because the station could continue operating as it had, profitably, for the past 60 years. Merely showing any limitation on use, especially hypothetical, future expansion, is

⁹ Id.

¹⁰ Id. at 116-17.

¹¹ Id. at 117. The Commission emphatically rejected the applications, terming the juxtaposition of styles an "aesthetic joke."

¹² Id. at 119.

¹³ Id. at 138.

¹⁴ Id. at 124.

¹⁵ Id.

¹⁶ Id. at 131-32.

¹⁷ Id. at 130-38.

insufficient to demonstrate that a taking has occurred.¹⁸ Additionally, the rejected proposals did not preclude award of a building permit for a more compatible plan.¹⁹ The regulation's economic impact was likewise acceptable under the Fifth Amendment. In a footnote, the court recognized that a taking would be recognized if the law so restricted the property that it "cease[d] to be economically viable."²⁰ The station could continue to turn a profit, and expansion compatible with the Landmark Preservation Law was not precluded, so Penn Central could achieve a reasonable return on the property even though it might have earned more from its proposed expansions. The government regulation, finally, was more regulatory than physical in nature.

Later cases clarified the regulatory "takings" inquiry. Cessation of economically viable use has been affirmed as the high showing claimants must make. In *Lucas v. South Carolina Coastal Council*²¹, for instance, the Court considered a claim that a regulation denying any building on beachfront property in parts of South Carolina took 100% of the value of the land. The Court agreed that the regulation denied "all economically viable use."²² In such rare cases, the Court will consider the regulation a *per se* taking.²³ If not, the *Penn Central* factor test is applied, but the practical outcome of this test is still to require a near-wipeout showing to tip the scales in the claimant's favor.²⁴

B. The Standard for Economic Hardship under Historic Preservation Laws

¹⁸ Id. at 130 (stating "the submission that appellants may establish a taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.").

¹⁹ CITE—late in case

²⁰ Id. at 138 n.36.

²¹ 505 U.S. 1003 (1992).

²² Id. at 1016.

²³ Id. at 1029.

²⁴ E.g. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (refusing to classify temporary moratoria as *per se* takings, and instead applying the *Penn Central* balancing test to reject the takings claim).

The Landmark Preservation Law enacted in New York City is an early example of a local preservation law, adopted in 1965. After *Penn Central* upheld the ability of the city to preserve, many more local jurisdictions enacted their own preservation laws.²⁵ These laws typically require review of new construction, alteration or demolition permits for designated landmarks or contributing buildings in historic districts.²⁶ Work affecting the exterior of the protected structure must be “compatible” with or “appropriate” for the historic character.²⁷ Frequently, these also feature an “economic hardship” provision that provides an “escape hatch” if denial of a permit would be extraordinarily burdensome.²⁸ These provisions usually set this level of burden at the same level as a regulatory taking under the Fifth Amendment.²⁹ For example, in New York, owners of commercial properties must demonstrate that their property is “not capable of earning a reasonable return,” defined as six percent of the value of the parcel³⁰ and in the District of Columbia, owners must show that the effect of the law would be to “amount to a

²⁵ E.g. The Historic Landmark and Historic District Protection Act of 1978 of Washington, DC was passed the same year as *Penn Central* was decided.

²⁶ E.g. DC Code §§ 6-1103 to 1105 and 1107 (creating the Historic Preservation Review Board and specifying procedures for demolition, alteration and new construction, N.Y.C. Admin. Code §§ 25-304 to 312 (outlining the Landmark Preservation Commission’s powers, procedures for obtaining certificates of appropriateness for construction or demolition, regulation of minor work and emergency repairs),

²⁷ Id. DC Code § 6-1101 states “that the purposes of this act are... [t]o assure that alterations of existing structures ... [and] new construction and subdivision of lots are compatible with the character of the historic district.” N.Y.C. Admin. Code § 25-307 provides “certificates of appropriateness” after considering “the effect of the proposed work in creating, changing, destroying or affecting the exterior architectural features of the improvement upon which such work is to be done” and “the relationship between the results of such work and the exterior architectural features of other, neighboring improvements in the district.”

²⁸ E.g. DC Code § 6-1102 (5)(e) (“*Unreasonable economic hardship* means that failure to issue a permit would amount to a taking of the owner’s property without just compensation or, in the case of a low-income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s).” (emphasis in original)), N.Y.C. Admin. Code § 25-309 (providing that a certificate of appropriateness may be granted if “the applicant establishes to the satisfaction of the commission that: (a) the improvement parcel (or parcels) which includes such improvement, as existing at the time of the filing of such request, is not capable of earning a reasonable return; and (b) the owner of such improvement: (1) in the case of an application for a permit to demolish, seeks in good faith to demolish such improvement immediately (a) for the purpose of constructing on the site thereof with reasonable promptness a new building or other income-producing facility, or (b) for the purpose of terminating the operation of the improvement at a loss; or (2) in the case of an application for a permit to make alterations or reconstruct, seeks in good faith to alter or reconstruct such improvement, with reasonable promptness, for the purpose of increasing the return therefrom.”).

²⁹ Id.

³⁰ N.Y.C. Admin. Code § 25-309, 302(v), Meredith J. Kane and Katharine L. McCormick, Historic Properties: Hardship Relief Can Be Claimed under Certain Tests N.Y.L.J., Mar. 30, 2005, at 5 (col. 2).

taking of the owner's property without just compensation.”³¹ In practice, meeting this standard through evidence of financial burden has proved quite difficult for owners of historic properties.

II. APPLICATION OF THE TAKINGS STANDARD TO NON-PROFIT PROPERTY OWNERS

A. The New York City Landmarks Law

New York has gone the farthest of any jurisdiction in creating a modified standard to apply to owners of non-profit organizations, both in statutory and in case law. The New York City Landmark Preservation Law was enacted in 1965, and was upheld in *Penn Central*.³² Under the Law, as previously mentioned, properties unable to earn a reasonable return of more than six percent of their value may be awarded a certificate of appropriateness. The provision of the city code continues, creating a separate “no reasonable return” category for owners of tax-exempt properties.³³ This section allows non-profit to make the following showing:

(2) In any case where any application and request for a certificate of appropriateness...is filed with the commission with respect to an improvement, the provisions of this section shall not apply to such request if the improvement parcel...has received, for three years...and at the time of such filing continues to receive [specified tax exemptions for non-profits]... and the applicant establishes to the satisfaction of the commission, in lieu of the requirements set forth [for commercial properties] that:

(a) The owner of such improvement has entered into a bona-fide agreement to sell...or to grant a term of at least twenty years...which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed; (b) The improvement parcel..., as existing at the time of the filing of such request, would not, if it were not exempt in whole or in part from real property taxation, be capable of earning a reasonable return; (c) Such improvement has ceased to be adequate, suitable or appropriate for use for carrying out both (1) the purposes of such owner to which it is devoted and (2) those purposes to which it had been devoted when acquired unless such owner is no longer engaged in pursuing such purposes; and (d) The prospective purchaser or tenant: (1) In the case of an application for a permit to demolish seeks and intends, in good faith either to demolish such improvement immediately for the purpose

³¹ D.C. Code § 11-244 § 3(14) (2006).

³² N.Y.C. Admin. Code § 25-301 to 322.

³³ The code identifies landowners who qualify for this separate standard by their tax-exempt status. For the sake of convenience, this note will continue to simply refer to these owners as charitable or non-profit.

of constructing on the site thereof with reasonable promptness a new building or other facility; or (2) In the case of an application for a permit to make alterations or reconstruct, seeks and intends in good faith to alter or reconstruct such improvement, with reasonable promptness.

The Landmarks Law has no legislative history. The legislature, however, must have felt that non-profit owners merited a separate showing from commercial owners under the economic hardship exception. The statutory text, however, provides no lower standard for non-profit owners, who must still show that the property would fail to generate a reasonable return of six percent “if it were not exempt... from...taxation.” Perhaps the drafters of the bill recognized that a “takings” analysis could not be applied neatly to non-profit properties. No action was taken, however, to shield these owners especially from the unevenly burdensome effects of the landmarks law. The resulting standard demonstrates the discretion the city council has to balance the goal of historic preservation with the goal of promoting non-profit services. Here, it seems reasonable to maintain a high standard for economic hardship, especially recognizing that these non-profits already enjoy tax-exempt status.

B. The *Snug Harbor* Standard for Charitable Use

The Landmarks Law provision of economic hardship for non-profit landowners requires these owners to be prepared to sell their property or lease it for at least twenty years, contingent on grant of a certificate of appropriateness, to receive relief under the economic hardship provision.³⁴ Owners who wish to continue using their property have successfully argued for a

³⁴ N.Y.C. Admin. Code § 25-309(2)(a) (“the provisions of this section shall not apply...if... the applicant establishes...that...[among other things] The owner of such improvement has entered into a bona-fide agreement to sell an estate of freehold or to grant a term of at least twenty years in such improvement parcel, which agreement is subject to or contingent upon the issuance of the certificate of appropriateness or a notice to proceed.”); Meredith J. Kane and Katharine L. McCormick, Hardship Relief Can Be Claimed Under Certain Tests, N.Y.L.J. 5, (col. 2) (Mar. 30, 2005) (“Owners of charitable property must instead make a showing that: (1) they have entered into a contract to sell their property or lease it for a minimum of 20 years and such contract is contingent on the issuance of a permit to demolish or substantially alter the property.”).

common law modification of the takings as applied in cases that develop under the Landmarks Law.³⁵

1. *Trustees of Sailor's Snug Harbor v. Platt*

The first case to establish this new standard was *Trustees of Sailor's Snug Harbor v. Platt*, decided in 1968.³⁶ In that case, a “charitable organization,” a home for retired sailors, filed for a demolition permit.³⁷ The home buildings owned by the organization, which were all built before 1880, “ha[d] largely outlived their usefulness and... [could] no longer provide suitable accommodations for the elderly men quartered in them.”³⁸ The home intended to build modern buildings to house the elderly men the organization housed, feeling “it would be remiss to its trust to fail to do so.”³⁹ Because the buildings had been designated historic landmarks, the home needed to receive a certificate of appropriateness under the Landmarks Law, but the certificate was denied because “in marked contrast to the [poor] accommodations provided by the interiors of the buildings...their exteriors...were one of the two best examples of Greek Revival architecture in the country and, as such, part of the aesthetic heritage of the nation.”⁴⁰ The home then asserted that the Landmarks Law “amounts to a taking” as applied to its property.⁴¹ The court first stated that a test for “undue economic burden” on commercial properties “where the continuance of the landmark prevents the owner from obtaining an

³⁵ *Trustees of Sailors Snug Harbor v. Platt*, 29 A.D.2d 376, 378 (N.Y. App. Div. 1968) (“Chapter 8-A provides some guidelines as to what constitutes an undue burden on commercial realty and provides relief in such instances (s 207-8.0, subd. a). However, the corresponding provisions in regard to property devoted to charitable uses are limited to the instance where the institution desires to alienate the property by sale or lease (s 207-8.0, subd. a par. (1), subpar. (b), cl. (2)). We agree with Special Term that this does not render the statute unconstitutional. It must be interpreted as giving power to the commission to provide relief in the situation covered by the statute, but not restricting the court from so doing in others.”).

³⁶ 29 A.D.2d 376.

³⁷ *Id.* at 377. (Plaintiffs will be referred to as “the home.”).

³⁸ *Id.* at 377.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 378.

adequate return.”⁴² In contrast, “[a] comparable test for a charity would be where maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose.”⁴³ Making this determination “would depend on the proper resolution of subsidiary questions,” including “whether the preservation... would depend on the proper resolution of subsidiary questions, would seriously interfere with the use of the property,” whether changes to return the building to usefulness could be done “without excessive cost,” or whether those changes would “entail serious expenditure,” evaluated “in the light of the purposes and resources of the petitioner.”⁴⁴ This test pushes the distinction between commercial and non-profit properties under the Landmarks Law further, but the decision did not clarify what showing this “comparable” test requires. It is possible that this test provided an ‘escape hatch’ for non-profit owners faced with significant financial burdens that draw funds away from their organizational missions. However, the court also specified that the test would be “comparable” to the commercial “takings” test, which suggests that the court was merely explaining how non-profits should be analyzed under that test. The “charity” test announced in *Snug Harbor* was outlined in broad terms⁴⁵, and in later cases, courts have tended toward the latter suggestion; *Snug Harbor* has provided a framework for analyzing the financial pressures of non-profit owners, but does not “ease” the “takings” standard in any way.

2. *Lutheran Church in America v. City of New York*

At first, it appeared that the New York courts might indeed provide an easier way around the Landmarks Law by finding a taking under *Snug Harbor*, as the test was applied in *Lutheran*

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ See Cindy Moy, Reformulating the New York City Landmarks Preservation Law’s Financial Hardship Provision: Preserving the Big Apple, 14 Cardozo Arts & Ent. L.J. 447) (noting that “What constitutes serious” in the term “serious expenditures,” “what level of interference is permissible under the “seriously interferes” prong, or how broadly and from when in the organization’s development “charitable purpose” is to be defined were all left open by the court).

Church in America v. City of New York.⁴⁶ This case concerned a landmarked Brownstown, formerly the residence of J.P Morgan Jr., owned and used by “a religious corporation” in midtown Manhattan.⁴⁷ Over time, “plaintiff’s office space requirements increased to such an extent that, even with the addition of a brick wing in 1958, the building became totally inadequate.”⁴⁸ The court applied *Snug Harbor*, stating that it “ruled that where designation would prevent or seriously interfere with the carrying out of the charitable purpose it would be invalid. That is a simple enough concept and ought to apply here.”⁴⁹ The *Lutheran Church* court held that because

it is uncontested that the existing building is totally inadequate... and must be replaced if plaintiff is to be able freely and economically to use the premises...The power given the municipality to force termination of plaintiff’s free use of the premises short of condemnation (which would provide compensation for plaintiff’s complete loss) directly violates plaintiff’s rights under the Fifth and Fourteenth Amendments to the United States Constitution, and [comparable provisions of] the New York Constitution...we find a situation exceeding the permissible limits of the zoning power.⁵⁰

One note author has argued that because the opinion “suggests that an organization’s original purposes are dispositive...the court failed to instruct upon how one ought to determine what is an organization’s charitable purpose and what constitutes serious interference” under the *Snug Harbor* test.⁵¹ Following this logic, a court could define “charitable purpose” broadly or narrowly, which in turn would increase or decrease the likelihood of “serious interference” with that purpose. In defining the Church’s “legitimate needs,” however, the court cited the “ample proof not seriously contested, that the use to which the property has been put for over 20 years would have to cease because of the inability under the designation to replace the building.”⁵²

⁴⁶ 316 N.E.2d 305 (N.Y. 1974).

⁴⁷ Id. at 307.

⁴⁸ Id.

⁴⁹ Id. at 311.

⁵⁰ Id. at 312.

⁵¹ Moy, *supra* at 460 (arguing that the court failed to address how charitable purpose ought to be determined).

⁵² 316 N.E.2d at 310.

While the court then held that application of the Landmarks Law to the property prevented the plaintiffs from carrying out their charitable purpose, the use over a significant length of time provided guidance in determining the church's "charitable purpose." The *Lutheran Church* court, therefore, filled in some of the blanks left by the *Snug Harbor* decision.

3. *The Society for Ethical Culture in the City of New York v. Spatt*

In the next New York case to consider non-profit landowners under historic preservation laws, *The Society for Ethical Culture in the City of New York v. Spatt*,⁵³ the court significantly limited possibilities of a lower standard under *Snug Harbor*. In the case, a "religious, educational and charitable organization" owned a landmarked Meeting House in Manhattan. The Society applied for a demolition permit, arguing that "the physical structure of the Meeting House [was] ill-adapted to its present needs."⁵⁴ The permit was denied, and the Society asserted a claim that its property was being "taken" under the Landmarks Law.⁵⁵ Despite the Society's argument, the reviewing court found that "petitioners' arguments [seemed] to emphasize aggrievement with respect to the prohibition against high-rise development" and that "[t]here [was] no genuine complaint that eleemosynary activities within the landmark [were] wrongfully disrupted, but rather the complaint is instead that the landmark stands as an effective bar against putting the property to its most lucrative use."⁵⁶ The court applied the *Snug Harbor* test, but refused to interpret the "substantial interference" language as anything more lenient than denial of all reasonable use. The court held on these facts that "there simply is no constitutional requirement that a landowner always be allowed his property's most beneficial use."⁵⁷ The *Society for Ethical Culture* court thus defined the "substantial interference" standard narrowly, as

⁵³ 415 N.E.2d 922 (N.Y. 1980). (Plaintiffs will be referred to as "the Society").

⁵⁴ Id. at 936.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

comparable with the takings standard for commercial properties. The court also clarified its understanding of the *Snug Harbor* test, stating that

“because charitable organizations are not created for financial return in the same sense as private businesses, for them the standard is refined to permit the landmark designation restriction only so long as it does not physically or financially prevent, or seriously interfere with the carrying out of the charitable purpose.”⁵⁸

Although the questions that a court would ask in assessing a “takings” claim by a non-profit owner had been “refined,” the measurement of the effect of the regulation on the historic property was not disturbed by *Snug Harbor*.

4. *St. Bartholomew’s Church v. City of New York*

The court in *St. Bartholomew’s Church v. City of New York*⁵⁹ has gone the farthest to date in New York in explaining what showing will support a takings claim under the Fifth Amendment and the New York Landmarks Law. In this case, a “not-for-profit religious corporation,” the Protestant Episcopal Church, owned two buildings in Manhattan, a Church and a Community House, from which it ran education and charity services.⁶⁰ Both buildings were landmarked in 1967.⁶¹ In 1983, however, the Church applied for two “certificates of appropriateness” for alteration of the Community House to replace it with a modern office building, and both were rejected.⁶² The Church also applied for a “hardship exception” to obtain the “certificate of appropriateness,” and was denied. The Church then brought a claim that application of the Landmarks Law effected a taking of its property under the Fifth Amendment, as applied through the Fourteenth Amendment.⁶³ The court evaluated the Church’s claim under *Snug Harbor*, and upheld the denials of the “certificate of appropriateness” because the Church

⁵⁸ Id. at 454-55.

⁵⁹ 914 F.2d 348 (2nd Cir. 1990).

⁶⁰ Id. at 351.

⁶¹ Id.

⁶² Id.

⁶³ Id. at 352. The Church also asserted a “religious exercise” claim under the First Amendment that the court considered at length. That claim, however, is not relevant to this paper.

could not show that the financial burden of renovating the property consistently with the Landmarks Law prevented the Church from “carrying out its charitable purpose in its existing facilities.”⁶⁴ The Church could demonstrate that renovations necessary to continued operation of the organization would be quite costly,⁶⁵ as much as \$4,500,000. This amount represented “approximately 41%” of the Church’s “estimated resources.”⁶⁶ Examining these figures, the court concluded that “the Church ha[d] not adequately demonstrated that it [was] unable to meet this expense.”⁶⁷ Further, the court suggested several options it felt were available to the Church to finance renovations. These included gradual withdrawals from the Church’s endowment to minimize impact, borrowing against the endowment, conducting a capital fundraising drive, and exploring the value of transferrable development rights in the airspace above the Church property.⁶⁸

The *St. Bartholomew* holding significantly narrows the *Snug Harbor* decision. Under the court’s analysis of the Church’s financial burden it is conceivable that no claim would ever rise to the level of a taking because creative options for funding will always exist. It is unclear just how far this or any other court would take such an argument. For example, if the necessary renovations had equaled or exceeded the total resources available to the Church, would the court have found a taking, or would the court still have required the Church to borrow and conduct a capital campaign? What is clear is that the *Snug Harbor* line of cases has not altered or reduced the showing required of non-profit owners in New York claiming a taking under the Landmarks

⁶⁴ Id. at 353.

⁶⁵ Actually, the district court below felt that the Church had some difficulty accurately estimating the cost of the proposed repairs, and did not accept the Church’s original estimates and instead accepting a figure of \$3,000,000. Because the Church argued that at least another \$1,500,000 would need to be spent, the Second Circuit uses the \$4,500,000 figure in its analysis.

⁶⁶ Moy, *supra* at 467.

⁶⁷ 914 F.2d at 359.

⁶⁸ Id. The church claimed it had exhausted the fund drive option, although the court found evidence to the contrary, and that the TDRs had no value, which the court also found contrary to other evidence.

Law. Courts analyze non-profits' takings claims separately from commercial properties, but owners must meet a takings test fundamentally the same, regardless of their identity.

C. Takings Claims in Pennsylvania Courts

The Pennsylvania courts have largely declined to implement a modified standard for non-profit landowners for takings claims under its historic preservation laws when they have been presented with the opportunity to do so. For example, in *First Presbyterian Church of York v. City Council of York*,⁶⁹ a Church applied for a demolition permit for York House, a building it owned within a historic district in the central part of York.⁷⁰ Wear over time and a fire in 1972 meant that the House needed significant repairs, and the Church demonstrated that “the costs of renovating York House for use by the Church would be \$29,000, that the cost of repairing fire damages...would be an additional \$17,000 (against a still unspent insurance recovery of \$10,000) and that annual maintenance costs...would be about \$12,500.”⁷¹ The Church argued that demolition was necessary because against its annual budget of \$254,000, this burden would effect a taking under the requirements of York’s historic preservation laws.⁷² In denying the Church’s claim, the Pennsylvania court considered applying the *Snug Harbor* test, which had been used by the Board of Historical Architectural Review in the town of York, but ultimately preferred to apply the test for a constitutional taking coming out of *Maher v. City of New Orleans*⁷³ because that case also considered a historic district, as opposed to the single landmark in *Snug Harbor*.⁷⁴ *Maher* provides a “reasonable return” test, requiring that the Church demonstrate that “the ordinance went so far as to preclude the use of the property for any

⁶⁹ 360 A.2d 257 (Pa.Cmmw.Ct. 1976)

⁷⁰ Id. at 259.

⁷¹ Id. at 260.

⁷² Id.

⁷³ 371 F.Supp. 653 (E.D.La. 1974)

⁷⁴ 360 A.2d at 161.

purpose for which it was reasonably adapted,”⁷⁵ and specifically to show that “sale of the property was impracticable, that commercial rental could not provide a reasonable rate of return, or that other potential use of the property was foreclosed.”⁷⁶ Because the Church in *First Presbyterian* had not attempted to sell the property, the court held that they had not proved a regulatory taking.⁷⁷ The court characterized the *Snug Harbor* test as “more stringent” and noted that the Church would not meet that standard either.⁷⁸ The court did not elaborate, however, on how *Snug Harbor* could be stricter than the constitutional standard for a “taking,” which provides the baseline for all takings analyses. In essence, the court appears to have simply considered and rejected *Snug Harbor* in favor of applying a more general “reasonable return” standard to all properties.

Additionally, the Supreme Court of Pennsylvania applied a straightforward “deprived of any profitable use” standard in a case remarkably similar to the facts of *Snug Harbor*. In *Park Home v. City of Williamsport*, a non-profit home for elderly women was operating in a Victorian building designated a historic landmark.⁷⁹ The home applied for a demolition permit, desiring to modernize its facilities. When the permit was denied, the home asserted that its property was being “taken” without just compensation by the application of the Williamsport historic preservation laws.⁸⁰ Because the home had not been offered for sale, however, the court concluded that the plaintiff could not have met its burden of proving that “any profitable use” had been deprived.⁸¹ The courts in this state have little difficulty applying the commercial standard to these non-profit organizations, treating them like any other type of landowner.

⁷⁵ Id. at 160.

⁷⁶ Id. at 161, *quoting* *Maier v. City of New Orleans*, 516 F.2d 1051, 1066 (5th Cir. 1975).

⁷⁷ 360 A.2d. at 162.

⁷⁸ Id.

⁷⁹, 680 A.2d 835, 837 (Pa. 1996).

⁸⁰ Id.

⁸¹ Id.

D. The District of Columbia Historic Preservation Act

In the District of Columbia, the “economic hardship” standard has been considered at length. In both statutory and case law, an “economic hardship” incorporates the takings standard as defined by the Supreme Court. At points, lawmakers and adjudicators considered the effects of this high standard on low-income landowners and on owners of non-profits, but no modification in the required showing has emerged. The development of the law is useful for considering what owners must actually demonstrate to prove a taking has occurred.

“Economic hardship” is defined in the Historic Landmark and Historic District Protection Act (“Historic Preservation Act” or “Act”) as “amount[ing] to a taking of the owner’s property without just compensation.”⁸² An early version of the Act, dated two days after the *Penn Central* decision, defined “undue economic hardship” as “the owner’s return from and use of the property are unreasonably limited without fault of the owner.”⁸³ Later, however, the language was changed to read “[u]nreasonable economic hardship’ means that failure to issue a permit would amount to a taking of the owner’s property without just compensation.”⁸⁴ Notes reveal that the Committee on Housing and Urban Development, who drafted the Act “designed [the definition of “economic hardship”] to embody the constitutional standard as defined by the United States Supreme Court.”⁸⁵ Because “economic hardship” tracks the constitutional standard, “the precise legal boundaries of this definition may change from time to time as the Court defines a taking for these purposes.”⁸⁶ At the time of enactment, therefore, “economic hardship” would be defined “under the constitutional standards ...most recently reaffirmed in the

⁸² D.C. Code § 6-1102(14). (“*Unreasonable economic hardship* means that failure to issue a permit would amount to a taking of the owner’s property without just compensation or, in the case of a low-income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s).”)

⁸³ COMMITTEE ON HOUSING AND URBAN DEVELOPMENT, COUNCIL OF D.C., REPORT ON BILL 2-367, 3 (Jun. 28, 1978), (hereinafter “COMMITTEE REPORT”).

⁸⁴ COMMITTEE REPORT, 6 (Oct., 1978).

⁸⁵ Id. at 6-7.

⁸⁶ Id. at 7.

context of landmark legislation by the Supreme Court in *Penn Central Transportation Co. v. City of New York* ... [that] the District of Columbia may place restrictions on land use without compensation so long as the owner of the property is left with some reasonable use.”⁸⁷ The Committee elaborated, stating that to meet the “economic hardship” standard,

a property owner will have to show that: (i) he cannot continue to use the property; *and* (ii) he cannot sell the property for an amount which would give him a reasonable return based on his actual investment; *and* (iii) he cannot sell the property for a price which would not be confiscatory based upon his actual investment; *and* (iv) the property is not suitable for adaptive reuse; *and* (v) his inability to use, rent, sell, or reuse the property is not the result of his own fault. For example, because through his own failure of maintenance the property has declined in value or become uninhabitable.⁸⁸

Perhaps because the Committee noted that it was creating a “strict test,”⁸⁹ the “economic hardship” definition was amended again. To the definition of “economic hardship” as a “taking,” the Committee added language stating that “in the case of a low-income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s).”⁹⁰ No explanation was recorded for the addition, so it is unclear what the Committee intended to be an “onerous and excessive financial burden.” The term could indicate that a “low-income owner” need not be burdened at the level of a taking to demonstrate “economic hardship.” Some reasonable return on the property might be permissible, so long as the financial burden remains great. The Committee also could have intended to emphasize the importance of the “economic impact” of historic designation, one of the three *Penn Central* factors, without changing how “economic impact” is measured. If this is true, the addition seems to carry more political significance than legal significance. In the thirty years following enactment of the law, no decision by the Mayor’s Agent has ever clearly found

⁸⁷ Id. at 6.

⁸⁸ Id. at 6-7.

⁸⁹ Id. at 6.

⁹⁰ COMMITTEE REPORT, MOTION TO AMEND (Nov. 14, 1978) (adopted unanimously).

that economic hardship existed under the low-income owner standard.⁹¹ Because there are few meaningful indicators that this language changes the definition of “economic hardship,”

The “onerous and excessive financial burden” must fall on “low-income owner(s).” By regulation, these are individual residential owners whose income is “eighty percent (80%) or less of the median household income for the Washington Metropolitan Area.”⁹² The individual homeowners suggested by this definition are in a vastly different financial position than many non-profit organizations, which can range from tiny groups on “shoestring” budgets to international organizations like the Red Cross or the United Way. No indication exists that the Committee considered non-profit owners as a special case, although it is clear that the Committee compared the Act it drafted with the New York City Landmarks Law.⁹³

In subsequent cases arguing for economic hardship under the Historic Preservation Act, the courts have kept to the clearly stated standard of a Fifth Amendment taking found in the Act. *900 G Street Associates v. Department of Housing and Community Development*,⁹⁴ for example, concerned a YWCA’s claim for a demolition permit under the economic hardship provision. the plaintiffs argued that economic hardship had taken place because “the property had been diminished in value by the [Act];...the value of the property...would be greater if the demolition permit...were issued;...the Building...will be considered independently of any other property owned by petitioner; and...no support or funding will be provided...for any renovation costs by

⁹¹ The closest case is Decision and Order of the Mayor’s Agent, HPA #01-094 (Oct. 4, 2001), in which the Mayor’s Agent found that a “significant financial inconvenience” but no taking existed in this case where homeowner applicants were required to replace their windows with wooden frames instead of the less expensive but also less historically correct vinyl. The opinion did not clearly state whether the case was being decided under the general or the low-income standard of economic hardship.

⁹² 10 D.C.M.R. §2599.1.

⁹³ COMMITTEE REPORT AT 7 (“This definition [of economic hardship] is based upon and similar to that used in the...New York City Landmarks Preservation Law.”)

⁹⁴ 430 A.2d 1387 (D.C. 1981).

governmental or private institutions.”⁹⁵ The DC Court of Appeals declined allowing these factors to equal economic hardship, which incorporates the high takings standard. The court held that

“if there is a reasonable alternative economic use for the property after the imposition of the restriction...there is no taking, and hence no unreasonable economic hardship to the owners, no matter how diminished the property may be in cash value and no matter if ‘higher’ or ‘more beneficial’ uses of the property have been proscribed.”⁹⁶

“In particular,” the court also stated, an owner must show that “the sale of the property was impracticable” to demonstrate that the property had “not provide a reasonable rate of return, or that other potential use of the property was foreclosed.”⁹⁷ There is little doubt from this language that the court is applying the full Fifth Amendment takings standard as announced in *Penn Central*.⁹⁸ The court has even simplified application of the standard, succinctly stating that the question is “whether there is any other reasonable economic use for the Building. If there is, there has been neither a constitutional taking nor an unreasonable economic hardship imposed.”⁹⁹

One of the goals of the DC Historic Preservation Act is “[t]o retain and enhance historic landmarks in the District of Columbia and to encourage their adaptation for current use.”¹⁰⁰ In furtherance of that goal, courts apply the takings standard incorporated into the Act, even though non-profits may be forced to invest a great deal of its available funds in the upkeep of its historic property, to sell its property and relocate, or to be forced out of existence.

III. Analysis

⁹⁵ Id. at 1390.

⁹⁶ Id.

⁹⁷ Id. at 1391.

⁹⁸ Id. “We are so persuaded to this conclusion by the Supreme Court’s recent decision in *Penn Central Transportation Co. v. New York City*”

⁹⁹ Id.

¹⁰⁰ DC Code § 6-1101(b)(1)(A).

Changing takings law for non-profit owners raises tension between two equally legitimate goals of government in exercising its police power. These are the importance of historic preservation and the importance of supporting private efforts to serve the community. Both goals have great merit. Historic preservation has been recognized as playing an important role in strengthening community ties. Preservation inspires patriotism and reminds the public of the history of their location. Preservation recognizes and protects attractive and interesting architecture and land planning. Preservation connects the community by transmitting a “sense of place” and by providing a forum for communities to engage in a dialog about what matters most to them.¹⁰¹ Non-profit organizations provide a number of services to the community, including education, relief from poverty, religious services, and legal services. Further, both of these goals have been recognized as legitimate ends of government. Historic preservation and regulation for aesthetics have been upheld as a valid exercise of the police power, which is broad enough to allow government to ensure that the community is “beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”¹⁰² Decisions to support organizations with charitable purposes through measures such as tax exemption have been upheld as bearing rational relationship to a legitimate state goal.¹⁰³ Importantly, it is also within the discretion of legislatures to prioritize between the ends it wishes to achieve.¹⁰⁴

¹⁰¹ See Carol M. Rose, *Preservation and Community: New Directions for the Law of Historic Preservation*, 33 *Stan. L. Rev.* 473 (1981).

¹⁰² *Berman v. Parker*, 348 U.S. 26, 33 (1954).

¹⁰³ *E.g. Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1997) (upholding the decision of Congress to support a particular type of lobbying group for veterans even though it did not generally allow an exemption for lobbying groups as rationally related to an interest in providing advantages to veterans).

¹⁰⁴ *Cf. Penn Central*, 438 U.S. at 126, *quoting* *Miller v. Schoene*, 276 U.S. 272 (1928) (stating that the *Miller* court found that “the State might properly make ‘a choice between the preservation of one class of property and that of the other’ and since the apple industry [at issue in *Miller*] was important in the State involved, concluded that the State had not exceeded ‘its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of advantages to veterans).

¹⁰⁴ *Cf. Penn Central*, 438 U.S. at 126, *quoting* *Miller v. Schoene*, 276 U.S. 272 (1928) (stating that the *Miller* court found that “the State might properly make ‘a choice between the preservation of one class of property and that of the

A. Should cities adopt a lesser standard of economic hardship for non-profits?

A close examination of takings law reveals that no “easier” standard has been created for non-profits. Some city councils and courts have thought, however, that non-profits present a sufficiently unique problem in takings questions to merit special analysis. The constitutional standard, as interpreted by the Supreme Court, provides a baseline that every government entity in the United States must follow. This, however, does not preclude local government from agreeing to compensate more frequently than the national standard.

Should local governments identify a regulatory burden, less than a “taking,” from which non-profits deserve relief? In support, society may receive a greater net benefit from non-profits if they can direct as many funds as possible toward their organizational missions. Excusing them from dedicating funds to historically compatible upkeep and expansion of their properties would free up those funds..

Conversely, most jurisdictions have no difficulty applying the “no viable economic use” or “no reasonable return” standard to both non-profit and for-profit entities. This may be the more rational approach. Even though non-profits by definition re-dedicate any profits earned back to their organizational mission, they work hard to generate as much funding as possible. In this light, non-profits are not far removed in terms of their investment-backed expectations from commercial property owners. There are many non-profit organizations that have far greater operating budgets than, say, a small “mom-and-pop” store, who might garner an equal amount of sympathy if denial of a demolition permit forced it to move to a less expensive location.

Individual cases of both non-profits and for-profits facing financial burdens under historic preservation laws can be found that would garner emotional support, but sympathy alone cannot

other’ and since the apple industry [at issue in *Miller*] was important in the State involved greater value to the public.’”).

be the basis of a legal standard. A rational analysis of the pressures applying to non-profit and commercial landowners reveals that each faces similar challenges in owning property subject to a historic preservation law.

Additionally, the takings standard in “economic hardship” provisions is designed to allow exceptions only in fairly rare cases where the property has actually been rendered useless by the regulation. This is sensible, because governments have limited resources with which to effect policies. If burdened landowners could circumvent historic preservation laws often, the laws would lose their effectiveness. Courts have routinely upheld, however, that some landowners will bear a greater burden than others to secure a benefit to the public as a whole.¹⁰⁵ For instance, the *Penn Central* court stated that

[i]t is true, as appellants emphasize, that... landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or “reverse spot,” zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones... In contrast... the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.¹⁰⁶

Historic preservation is fully within the government’s power to promote and can provide significant benefits to the community, but those benefits are only secured if the government has given itself the power to enforce the law effectively. Diminutions of that power should not be implemented without much careful consideration.

Further, while it is possible and laudable for government to adopt policies to free non-profits from as many financial burdens as possible, historic preservation laws are not the only way to accomplish this. The tax exemptions available to non-profit organizations already secure

¹⁰⁵ *E.g. Penn Central* 438 U.S. at 131-32 (rejecting plaintiffs’ argument that the New York Landmarks Law is unconstitutional because it uniquely burdens only owners of landmarked properties).

¹⁰⁶ *Id.*

significant benefit for these organizations. It is quite possible that lawmakers enacting historic preservation laws felt this benefit already adequately addressed any special concerns for non-profits.

Finally it is equally possible that historic preservation can benefit as well as burden non-profits with historic properties. For instance, a booming real estate market might create enormous pressure on owners of historic properties, which typically do not fill the entire envelope allowed in their zoning districts, to sell to developers.¹⁰⁷ In these instances, landmarking or historic districting might make the property less attractive to developers, allowing the non-profit to continue operations insulated from the ups and downs of market pressures. Alternatively, even if non-profits are pressured to sell because the financial or physical burden is too great in their current, historic location, historic preservation can increase the value of land. The higher price the organization could receive for the land may even outweigh any costs of having to change locations.¹⁰⁸ Non-profits could also leverage their location in creative ways, such as selling the transferrable development rights above their roofs to new construction properties.¹⁰⁹ These examples illustrate at least that the effects of historic preservation laws on non-profit owners might be too varied to justify relief based on a lesser showing than required for commercial properties.

B. There is a need to clarify what evidence is required for owners to meet the takings standard.

It is within legislative discretion to choose whether to address the concerns with modifications in ‘takings’ law for non-profits. No such modification is recommended, however.

¹⁰⁷ See David M. Stewart, Constitutional Standards for Hardship Relief Eligibility for Nonprofit Landowners under New York City’s Historic Preservation Law, 21 Colum. J.L. & Soc. Probs. 163, 167 (1988) (discussing the economic context of land ownership by nonprofits in the New York City real estate market).

¹⁰⁸ Cf. Stewart, *supra* at 167-68.

¹⁰⁹ Stewart, *supra* at 167 (“The sale of air rights over a landmark museum, for example, might endow its owner permanently.”).

Non-profits are difficult to distinguish from commercial properties in land ownership, they already benefit from tax relief, government's resources are limited, and historic preservation may help as well as hurt non-profits. However, from the varied case law on the topic, one important improvement in the body of law on the subject suggests itself: a clarified, perhaps statutory statement of what an owner seeking to make a hardship claim must prove in order to prevail. In the New York statute and in the courts of Pennsylvania and the District of Columbia, owners must show that their properties would not even be able to be sold without receiving a permit for demolition, alteration or new construction. While this is a fairly clear requirement of plaintiffs, two main flaws exist. First, this standard does not address the organization who does not want to sell, unless they offer their property on the market for the sole purpose of generating proof for their claim. Second, as addressed most clearly in *St. Bartholomew*, creative lawyering should mean that no takings claim of financial exhaustion of the non-profit owner's resources may ever succeed. There will always be one more method of raising funds that could be dreamt up that even a plaintiff making a good faith effort to raise funds may not have attempted.

Additionally, the District of Columbia Historic Preservation Act lists evidence that must be produced before a Mayor's Agent hearing raising an economic hardship claim. The showing includes the following:

(A) For all property: (i) The amount paid for the property, the date of purchase and the party from whom purchased, including a description of the relationship, if any, between the owner and the person from whom the property was purchased; (ii) The assessed value of the land and improvements thereon according to the two most recent assessments; (iii) Real estate taxes for the previous two years; (iv) Annual debt service, if any, for the previous two years; (v) All appraisals obtained within the previous two years by the owner or applicant in connection with his purchase, financing or ownership of the property; (vi) Any listing of the property for sale or rent, price asked, and offers received, if any; and (vii) Any consideration by the owner as to profitable adaptive uses for the property; and (B) For income-producing property: (i) Annual gross income from the

property for the previous two years; (ii) Itemized operating and maintenance expenses for the previous two years; (iii) Annual cash flow, if any, for the previous two years.¹¹⁰

This list should ensure that ample evidence will be presented to support a decision, but it provides no guidance on what facts will result in a finding of economic hardship.

The New York City Landmarks Law supplies a fixed amount, at which “no reasonable return” is set. The six percent figure, while somewhat arbitrary, is the best example of a clearly stated standard by which property owners can measure their burden.¹¹¹

Therefore, it is proposed that historic preservation ordinances with economic hardship provisions could be amended by adding a provision such as the following: “economic hardship” will occur when the effect of the regulation amounts to a taking without just compensation under the Constitution, to be demonstrated by either (a) inability to utilize the property in the uses to which it has been put by the current owner, such that the currently available resources of the owner are exhausted; and (b) inability to sell the property; or (c) that the return on the property is less than six percent of the property’s value free of the regulation, or a similar fixed percentage that would render the return negligible.” Like almost any standard, this leaves room for some interpretation by courts. The goal of a standard like this, however, is to make as clear as possible to landowners just how great the burden of a regulation must be to reach a taking. Such certainty would limit the total number of claims asserted in court, because landowners could better judge for themselves whether their burden rises to the level of a taking. Certainty would also increase the number of meritorious claims as a portion of the whole that are brought to court, and it would encourage consistency in the outcomes of takings cases.

¹¹⁰ DC Code § 6-1104(g).

¹¹¹ N.Y.C. Admin. Code § 25-302(v).

